

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 371 of 1998

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DHIRJIBHAI SARTANBHAI DESAI

Versus

STATE OF GUJARAT

Appearance:

MR SAURIN A SHAH for Petitioner

MR KT DAVE APP for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 13/07/98

ORAL JUDGEMENT

Heard learned advocate Mr. Saurin A. Shah for the petitioners and learned APP Mr. K.T Dave for the Opponent-State.

2. This petition raises a short question as to whether the learned Magistrate is bound to take accused

in custody as and when he presents himself before the Magistrate and to consider his application for release on bail under Section 439 of the Code of Criminal Procedure {hereinafter referred to as "the Code"}.

3. The facts leading to the present petition are as under :-

3.1 Petitioner is one of the accused in an offence punishable under Section 302 read with Section 34 of the Indian Penal Code, registered at Amraiwadi Police Station as C.R No. I-282/97. The petitioner has been released on bail. While the petitioner has been enlarged on bail, as aforesaid, another complaint came to be lodged against the petitioner and two others before the Amraiwadi Police Station, which is registered as C.R No. II-3276/98. It appears that investigation in the said complaint is in progress, neither the petitioner has been arrested nor the summons has been issued against him. However, the petitioner having come to know about the said complaint having been lodged against him, on 23rd June, 1998, appeared before the learned Magistrate and surrendered himself before the Court. The petitioner prayed that he be taken in custody and be released on bail. Petitioner's attempt to surrender before the Magistrate and be released on bail was opposed by the Public Prosecutor. The learned Magistrate, after hearing the parties, rejected the application to surrender made by the petitioner under his order dated 23rd June, 1998. Feeling aggrieved, the petitioner has prayed for setting aside that order.

4. Mr. Shah has relied upon Section 437 of the Code and has submitted that the accused has a right to surrender before the Court even before he is arrested or detained in custody by the police or before the Court issues summons upon him and on the accused's surrendering himself before the Magistrate, he is deemed to be in custody and he has a right to give bail and be released. Mr. Shah has submitted that moment the accused offers himself to the order of the Court, he is deemed to be in custody and the Magistrate has no other alternative but to make an order sending him either to the judicial custody or to the police custody or to release him by taking bail. In the present case, however, the learned Magistrate adopted the fourth course i.e., the learned Magistrate has refused to accept his surrender and to entertain his application for release on bail, which is contrary to law. In support of his contention, Mr. Shah has relied upon Supreme Court judgment in the matter of Niranjan Singh & Anr. v. Prabhakar Rajaram Kharote &

Ors., (AIR 1980 SC 785). He has particularly relied on paragraph 9 of the judgment where the court has held that, "he can be in custody not merely when the police arrests him, produces him before the Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions." Mr. Shah has also relied upon judgment of the Calcutta High Court in the matter of Digendra Sarkar & Ors., (1982 Cr.L.J. 2197). The Calcutta High Court following the judgment in the matter of Niranjana Singh & Anr. (Supra) held that the learned Magistrate was required to accept the surrender of the petitioners and deal with their application for bail. Having held thus, the Court directed the learned Magistrate to accept the surrender of the petitioners, if they appear and surrender themselves before him and consider their application for bail after giving notice to the State.

5. Petition is contested by the State. Mr. Dave, the learned APP has relied upon the judgment of this High Court in the matter of State of Gujarat v. Karamsi Nayabhai Patel, (1986 GLH 629). He has submitted that to investigate a crime and to arrest the accused is essentially a function of the executive and ordinarily, the learned Magistrate does not arrest the accused. The powers of the Magistrate to arrest the accused are supplementary to those of executive and they have to be exercised sparingly so as not to create obstacles in the investigating machinery. He has further submitted that in the event the accused surrenders before the Court and in all such cases the Magistrate is required to accept the surrender and send the accused either to the judicial custody or to release him on bail, the same would necessarily hamper the investigation. By such an action, the powers of police to detain the accused for investigation for not more than 24 hours would also be jeopardized. He has submitted that the police officer has a right to arrest the accused and detain him in custody for investigation for not more than 24 hours. Such accused can be detained in custody even after 24 hours but not without the express permission of the Court and this valuable right to detain cannot be taken away from the police by accepting the surrender of the accused before the Magistrate. He has submitted that in the present case also, the learned Magistrate was conscious about his power to accept the surrender and to consider the application made for release on bail. The learned Magistrate having considered the facts of the case has come to the conclusion that if the surrender of the petitioner were accepted and petitioner were sent in

judicial custody or were released on bail, such an action would hamper the police investigation and would not be in the interest of public. Mr. Dave has, therefore, submitted that the learned Magistrate has rightly rejected the application made by the petitioners.

6. Mr. Shah has tried to distinguish the judgment of this Court in the matter of Karamsi Nayabhai Patel (Supra) emphasizing on the fact that the accused therein had earlier applied for anticipatory bail and the same was refused. Thus, accused therein had no reason to apprehend the abuse of process of law at the hands of the police, while in the present case, the petitioner has legitimate apprehension of abuse of authority by the police. Further, even while holding that the accused is not necessarily required to be taken in judicial custody while he surrenders before the Magistrate, the Court in paragraph 14 of the judgment has held that, "These functions may be exercised by him in extra-ordinary circumstances such as, when the safety of the accused calls for the exercise of such power or when he feels that it is necessary to exercise power to prevent the abuse by the investigating agency."

7. In the matter of Niranjansingh {Supra}, the Court was considering the powers of the learned Magistrate to release accused on bail under Section 439 of the Code. The question arose whether the accused who surrenders before the learned Magistrate without his being brought by the police can be said to be a person in custody and whether such a person can make an application for release on bail under Section 439 of the Code. The Court considering the scheme of the Code and the provisions contained in Sections 437 and 439 of the Code came to the conclusion that it is not necessary that for being entitled to apply for release on bail under Section 439 of the Code, the accused has to be arrested and be brought before the Magistrate by the investigating agency or that he has to be taken into judicial custody by issuing process. The Court, as reproduced hereinabove, has held that the accused who surrenders himself before the Magistrate against whom no summons has been issued by the Court or who has not been brought before the Court by the Investigating agency also can be said to be in custody and can apply for release on bail under Section 439 of the Code. The implications of this judgment are discussed by this Court in the matter of Karamsi Nayabhai Patel (Supra). The Court relying on the Supreme Court judgments in the matter of Niranjansingh (Supra) and in the matter of State of Bihar v. Ram Naresh, (AIR 1957 SC 389) held that in paragraph 9 of the judgment held that,

".....however, at the same time, as stated hereinabove, the powers to take a person into custody has been specifically conferred upon the Magistrate. Therefore, this power cannot be denied to him. But when the Magistrate is called upon to exercise this power, he is required to guard himself by posing the questions : (i) What is the purpose of conferment of this power ? (ii) Why should he exercise this power at that particular juncture of time ? and (3) Will the exercise of power be supplemental to the executive functions of the investigating agency ? or would it become an obstacle or obstruction to the process of investigation ?..... Therefore, it is clear that this power should be exercised in aid of the investigation. Atleast, it cannot be exercised to thwart or obstruct the investigation..... If the exercise of power is likely to result in creation of obstacles and/or obstruction in the process of investigation by the executive authorities, the Magistrate should not exercise the power of taking the accused into judicial custody. On the contrary, it would be his duty to say that he would not exercise the power because it is likely to frustrate the very object of conferment of power."

8. In the present case also, the learned Magistrate, while considering the application made by the petitioners has taken into account the facts of the case and has come to the conclusion that in the event the petitioners' surrender were accepted, the petitioner were taken into judicial custody, the same would create obstruction in the process of investigation by the investigating agency and having so concluded, refused to accept surrender of the petitioner. In view of the judgment of this Court in the matter of Karamsi Nayabhai Patel (Supra), the order of the learned Magistrate cannot be said to be erroneous or contrary to the judgment of the Supreme Court in the matter of Niranjansingh (Supra). The observations made in paragraph 14 of the judgment in the matter of Karamsin Nayabhai Patel (Supra) would not come to the rescue of the present petitioner since so far it is an admitted position that neither the petitioner has been summoned for interrogation by the police nor has he been arrested. It is merely an apprehension of the petitioner that the Investigating Agency may abuse its powers and cause harassment to the petitioner. This court would not exercise its power to redress imaginary grievance. The view expressed by the Calcutta High Court in the matter of Digendra Sarkar & Ors. (Supra) being contrary to the view expressed by this Court in the matter of Karamsi Nayabhai Patel (Supra), the same does not require further consideration.

9. In view of the above discussion, the impugned order of the learned Magistrate dated 23rd June, 1998 does not call for interference. Petition is, therefore, dismissed. Rule is discharged.

Prakash*